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IN THE

Supreme Court of the United States

October Term, 1966

No. 729

ROYAL NETHERLANDS STEAMSHIP COMPANY,
Petitioner,

-against-

STRACHAN SHIPPING COMPANY, *Respondent.*

RESPONDENT'S REPLY TO THE PETITION FOR WRIT OF CERTIORARI

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RESPONDENT'S REPLY TO THE PETITION FOR WRIT OF CERTIORARI

Respondent, Strachan Shipping Company, would show this Court that Petitioner's Petition for Writ of Certiorari seeking judgment in its favor is unsupportable because the simple facts are that under no circumstances could the decision of the Court of Appeals for the Fifth Circuit be amended to provide for judgment in favor of Royal Netherlands Steamship Company. Not only are the jury's answers to the interrogatories utterly meaningless whether considered separately or collectively, but at no time did Petitioner request or the Trial Court propound interrogatories covering the ultimate issues. For the reasons set forth in its own Petition for Writ of Certiorari, Strachan respectfully submits that the Trial Court's judgment should

be reinstated and the opinion of the Court of Appeals below reversed.[1] Henceforth, for convenience, the parties will be referred to as they were by the Court of Appeals below, simply as Rawlinson (the injured longshoreman), Royal (the vessel owner) and Strachan (the stevedore).

STATEMENT

It is necessary for Strachan to recite the essential facts due to the incomplete and often misleading statement made by Royal. Royal would lead this Court to believe that the sole cause of Rawlinson's injury was the conduct of Strachan's employees; however, the evidence presented several fact issues for jury determination as to the cause of the accident. The opinion of the Court of Appeals set forth some of the disputed facts of the accident rather concisely:

> "The injuries of Rawlinson were sustained while he was engaged, with others, in loading a cargo of pipe on the SS MENTOR, owned by Royal Netherlands. A length of pipe was being raised from the dock to the ship by two winches. It appeared to C. E. Hartley, one of Strachan's winchmen, that one end of the pipe might strike a shroud. He stopped his winch and signaled W. E. Hedigar, Strachan's other winchman, to stop his winch. There is a dispute as to whether Hedigar missed the signal and did not attempt to stop the winch, or the winch was defective and did not respond to the winchman's effort to stop it. The winch continued to operate causing the low end of the pipe to swing in against the ship. Rawlinson was caught between the pipe and the ship and the resulting injuries initiated this litigation. Rawlinson's action against Royal Netherlands, in which he asserted both

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[1] No. 741, October Term, 1966. Strachan Shipping Co. v. Royal Netherlands Steamship Company, Petitioner's writ of certiorari to the U. S. Court of Appeals for the Fifth Circuit.

negligence and unseaworthiness, was settled by the payment of $20,000 by Royal Netherlands. It reserved the right to seek indemnity from Strachan."

In addition to the foregoing disputed facts, other disputed facts were whether Strachan had reported the defective vessel's winch to one of Royal's officers and whether Royal had failed to take any steps to repair its own defective equipment.

With the evidence presenting these disputed facts, the Trial Court at the request of Petitioner as provided for by Rule 49(a) of the Federal Rules of Civil Procedure submitted Royal's action for indemnity upon special interrogatories. In fact, the Trial Court submitted the charge and interrogatories in exactly the form, word for word, requested by Royal with Strachan being permitted to take exceptions.[2] The interrogatories as requested by Royal and submitted by the Trial Court merely inquired into some of the disputed points of evidence and did not ask the jury to pass upon the ultimate issues which were essential to a judgment in favor of Royal.[3]

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[2] R. 40, 42-46, 51, 64, 65, 77 and 79. A perfect example is the Trial Court's decision as set forth at page 51 of the record: "I have decided to submit this case as the plaintiff (Royal) wants it submitted, and so whatever the plaintiff (Royal) wants in that respect I will grant it and defendant (Strachan) may have his exceptions." (Parenthetical names added)

[3] The interrogatories actually submitted were along the lines of "did the load strike the shroud," "was there a tag line on the load," etc. This is most surprising in view of the pre-trial stipulation entered into by Royal in which Royal contended that two of the ultimate fact issues were: "3. Did 'Strachan' breach the implied warranty" (the implied warranty of performing the stevedoring operations in a reasonably safe and workmanlike manner) and "6. Was 'Royal' guilty of any conduct which would preclude 'Royal' from recovering indemnity from 'Strachan'?" (Parenthetical expression added from paragraph 2 of the stipulated issues.) (R. 84-85)

The Court of Appeals reversed the judgment of the Trial Court with remand for a new trial on the basis of the inconsistent and conflicting answers given by the jury to the inadequate interrogatories which were submitted.

The two ultimate issues which were not submitted to the jury for its determination—here again, at Royal's insistence that they were not necessary—were:

1. Whether any conduct of Strachan breached its warranty of workmanlike service to Royal which breach was a proximate cause of the accident.

2. Whether Royal's conduct was sufficient to preclude indemnity.[4]

Having requested the Trial Court to obtain only findings on evidentiary facts and not upon the ultimate issues of breach of warranty and conduct sufficient to preclude, Royal cannot now be heard to complain that these fact issues did not need to be submitted to the jury.[5]

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[4] Strachan's Petition for a Writ of Certiorari, No. 741, October Term, 1966, in this case discusses this failure in detail, pages 2 through 7 and 12 through 14.

[5] Rule 49(a) of the Federal Rules of Civil Procedure provides: "If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. **As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict.**" (Emphasis supplied) There are decisions denying indemnity in a situation covering the report by the longshoremen to a representative of the vessel of a defective winch—see **Hodgson v. Lloyd Brasiléiro Patrimonio Nacional,** 294 F.2d 32 (3rd. Cir., 1961) cert. den. 369 U.S. 848, 8 L.Ed. 2d 8, 82 S.Ct. 931 (1963); **Smith v. Pan-Atlantic Steamship Corporation,** 161 F.Supp. 422, aff'd. per curiam at 254 F.2d 600 (3rd. Cir., 1958) and **Hagans v. Farrell Lines, Inc.,** 237 F.2d 477 (3rd. Cir., 1956).

Royal seeks to have this Court grant its Petition and render judgment as a matter of law in this case. Without listing all of the reasons why this cannot be done, there are at least four cogent reasons why this should not and cannot be done:

1. The jury did not pass upon the ultimate issues which are essential to Royal's recovery.[6]

2. The jury was not requested to make a finding as to whether Strachan's conduct was a proximate cause of Rawlinson's injury.[7]

3. No instruction was given by the Trial Court in connection with the interrogatories to confine the jury's deliberation to the reciprocal duties existing between Royal and Strachan. In other words, without such an instruction, the jury was in a position to consider the duties and obligations owed by Royal to Rawlinson, Strachan to Rawlinson, Rawlinson to Strachan, Rawlinson to Royal, etc. The respective duties vary to a great extent and the consequences as to a breach of each duty are vastly different.[8]

4. Nowhere within the Trial Court's charge is there even the remotest inference that Royal had the burden of proof upon the issues which were submitted.[9]

Each reason will be briefly reviewed under separate headings.

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[6] See full discussion, **infra**, pages 6 to 8.

[7] See full discussion, **infra**, pages 8 to 10.

[8] See full discussion, **infra**, pages 10 to 11.

[9] See full discussion, **infra**, pages 11 to 13.

THE ISSUES ESSENTIAL TO ROYAL'S RECOVERY OF INDEMNITY WERE NEVER SUBMITTED TO THE JURY

This Court held almost from the inception of indemnity cases such as this that to recover indemnity the shipowner must establish that the stevedore failed to do its work in a reasonably safe and workmanlike manner, and that the shipowner was not guilty of conduct sufficient to preclude indemnity, and that both of these are fact issues for the jury's determination. In the *Weyerhaeuser* case, this Court stated it quite concisely:

> ". . . If in that regard Respondent (stevedore) rendered a substandard performance which led to foreseeable liability of Petitioner (shipowner), the latter (shipowner) was entitled to indemnity absent conduct on its (shipowner's) part sufficient to preclude recovery. *The evidence bearing on these issues . . . was for jury consideration under appropriate instructions.*[10] (Parenthetical expressions and emphasis added)

This Court reaffirmed this holding in the *Ellerman Lines* case[11] in which a jury, against a background of conflicting evidentiary issues, had answered in the affirmative a direct inquiry as to whether or not the stevedore had performed the cargo operations in accordance with its contractual obligation. This Court reaffirmed that such an issue was one of fact calling for the jury's determination, and in so doing reversed the opinion rendered by the Court of Appeals substituting its contrary conclusion for the answer given by the jury. Various Courts of Appeals have also

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[10] **Weyerhaeuser Steamship Co. v. Nacirema Operating Co., Inc.**, 355 U.S. 563, 2 L.Ed.2d 491, 78 S.Ct. 438 (1958).

[11] **Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.**, 369 U.S. 355, 7 L.Ed.2d 798, 82 S.Ct. 780 (1962).

held that the factors essential to Royal's recovery of indemnity are unquestionably ones of fact,[12] and at no time were these issues essential to a judgment in favor of Royal presented to the jury in this case.

The Trial Court's charge and set of interrogatories are completely void of any inquiry into the ultimate issues upon which Royal has the burden and in reality cover only the contested evidentiary issues.[13] Of course, Royal cannot complain of this omission since the charge and interrogatories were submitted by the Court in exact conformity with Royal's request.[14] What Royal now seeks is to take its own interrogatories, which under no stretch of the imagination present a predicate for recovery, and

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[12] **Waterman Steamship Corp. v. David,** 353 F.2d 660 (5th Cir., 1965), cert. den. 16 L.Ed.2d 683 (1966); **Damanti v. A/S Inger,** 314 F.2d 395, 397 (2nd Cir., 1963), cert. den. 375 U.S. 834, 11 L.Ed.2d 64, 84 S.Ct. 46 (1963); **Moore-McCormack Lines, Inc. v. Maryland Ship Ceiling Co.,** 311 F.2d 663 (4th Cir., 1962); and **McNamara v. Weichsel,** 293 F.2d 900 (2nd Cir., 1961).

[13] **Waterman Steamship Corporation v. David,** 353 F.2d 660, 664 (5th Cir., 1965) cert. den. 16 L.Ed.2d 683 (1966) offers a most up-to-date review of the reciprocal duties existing between the vessel owner and the stevedore. It is stated: "The stevedore's negligence **is immaterial** unless it is a breach of the contractual warranty of workmanlike service and is the proximate cause of the longshoreman's injuries." (Emphasis supplied) All facts as found by the jury in the instant case by analogy are immaterial since at no time did the jury make a finding as to whether the facts so found constituted a breach of Strachan's implied contractual duty owed Royal.

[14] The Trial Court on numerous occasions advised Royal that the charge and interrogatories would conform exactly to Royal's request (R. 40, 42-46, 51, 64, 65, 77 and 79). The Trial Court commented commencing at the bottom of page 42 of the record, "Since you cannot (agree), I am inclined to submit the case exactly as the plaintiff wants it submitted, and let the plaintiff stand or fall on the verdict." The reply given by Royal was: "Needless to say, Your Honor, I have no objection to that. That would be just fine." (Parenthetical expression added)

argue for judgment. The interrogatories as propounded by the Trial Court merely presented to the jury for resolution certain evidentiary points which were in dispute, and at no time was the jury given an opportunity to inquire into the two ultimate issues of fact; namely, did Strachan breach its warranty of workmanlike service and was Royal's conduct sufficient to preclude its action for indemnity.[15]

As these are clearly fact issues for jury determination, this Court cannot determine them as a matter of law as Royal asks it to do.

THE JURY WAS NEITHER REQUESTED TO MAKE NOR DID MAKE ANY FINDING AS TO STRACHAN'S CONDUCT BEING A PROXIMATE CAUSE OF RAWLINSON'S INJURY

Despite the fact that Royal in the Pre-Trial Stipulation stipulated that one of the ultimate issues was whether Strachan's "breach (was) a proximate cause of the accident to Rawlinson,"[16] the interrogatories on causation as requested by Royal and submitted by the Trial Court inquired only as to whether a specific act was a "contributing cause."[17] The error was compounded because the

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[15] In an effort to obtain complete findings of fact and to bring the instant litigation to a conclusion, Strachan requested the submission of interrogatories covering the two issues of fact (R. 101-103), and excepted to the Trial Court's interrogatories due to their exclusion (R. 72 and 76).

[16] R. 85.

[17] Strachan's desire to bring a conclusion to the controversy prompted a request that the term proximate cause be used (R. 102-103), offered a definition of proximate cause in its proposed charge (R. 91) and objected to the use of the term contributing cause (R. 67, R. 72-73).

jury was not given any definition of "causation" by which to be guided in their deliberations. Thus, the issue of causation was improperly and incompletely requested by Royal and erroneously and incompletely submitted by the Trial Court.

Strachan is not jousting with semantics for this Court has made it abundantly clear that the element of foreseeability is to be considered insofar as causation is concerned, and it is elementary that "proximate" and not "contributing" cause is the proper way to submit the issue. In the *Weyerhaeuser* case, the proposition was stated in the following manner:

> ". . . If in that regard Respondent (stevedore) rendered a substandard performance *which led to foreseeable liability of Petitioner (shipowner)*, the latter (shipowner) was entitled to indemnity absent conduct on its part sufficient to preclude recovery . . ." (Parenthetical expressions added and emphasis supplied)[18]

Following this admonition, the Court of Appeals below on other occasions has also held that proximate cause is the issue.[19]

Not only was the wording of the causation issue improper, but at no place within the Trial Court's charge

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[18] **Weyerhaeuser Steamship Co. v. Nacirema Operating Co., Inc.**, 355 U.S. 563, 2 L.Ed.2d 491, 78 S.Ct. 438 (1958).

[19] The Fifth Circuit ruled in **Grace Lines, Inc. v. Port Everglades Terminal Company**, 324 F.2d 699, 702 (5th Cir., 1963): "Moreover, such matters as **foreseeability and proximate cause**, under the facts in dispute, should have been submitted to the jury under appropriate instructions . . ." (Emphasis added). See also **Reddick v. McAllister Lighterage Line**, 258 F.2d 297, 300 (1958) cert. den. 358 U.S. 908, 3 L.Ed.2d 229, 79 S.Ct. 235 (1958).

was there a definition of "contributing cause" or advices to the jury that foreseeability was an ingredient to be considered by the jury in its deliberations on the interrogatories dealing with causation.[20] It is an undisputed axiom that terminology peculiar to the controversy must be defined in the Trial Court's charge and, therefore, the jury's answers to the causation issues are utterly meaningless because the jury was not given any definition of "causation" to use as a standard in measuring Strachan's conduct.

THE JURY'S INQUIRIES WERE NOT LIMITED BY THE COURT'S CHARGE TO THE RECIPROCAL DUTIES WHICH ARE DETERMINATIVE OF THE INDEMNITY ISSUE

At no place within the charge did the Trial Court limit the jury's inquiry to the dispute between Royal and Strachan, but the jury was at liberty to consider the duties owed by Royal to Rawlinson and Strachan to Rawlinson.[21] This Court in *Weyerhaeuser* specifically stated that such a cautionary instruction is essential, for it is stated that:

> ". . . If in that regard Respondent (stevedore) rendered a substandard performance which led to *fore-*

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[20] R. 51-63. The failure to define the term was pointed out to the Trial Court by Strachan (R. 67, 73), but upon the Trial Court's inquiry concerning the objections and exceptions, Royal replied, "None is good, sir." (R. 77).

[21] Rawlinson's action as to Royal was predicated upon the two tort principles of negligence and unseaworthiness. It is clear that Royal's attempt to recover indemnity from Strachan is completely divorced from the tort concept, but is limited solely to contractual considerations. **Italia Societa Per Azioni Di Navigazione v. Oregon Stevedoring Company, Inc.**, 376 U.S. 315, 11 L.Ed.2d 732, 84 S.Ct. 748 (1964), and **Waterman Steamship Corporation v. David**, 353 F. 2d 660, 664 (Headnote 3) (5th Cir., 1965), cert. den. 16 L.Ed.2d 683 (June, 1966).

seeable liability of Petitioner (shipowner), the latter (shipowner) was entitled to indemnity absent conduct on its (shipowner's) part sufficient to preclude recovery. The evidence bearing on these issues—Petitioner's (shipowner's) action in making the shelter on its ship available to Respondent's (stevedore's) employees in Boston although it apparently was unsafe, as well as Respondent's (stevedore's) continued use of the shelter for five days thereafter without inspection—*was for jury consideration under appropriate instructions.* These issues were not encompassed by the instructions in the main case, where the test of Petitioner's (shipowner's) liability was based on failure to perform a non-delegable duty to Connally (injured longshoreman). *Since the liability of Respondent (stevedore) depended upon different principles . . . all fact issues involved in the third party action should have been submitted to the jury* after the verdict in the main case (injured longshoreman's case against shipowner)." (Parenthetical expressions added and emphasis supplied)

Therefore, for this additional reason, Royal's reliance upon the issues submitted to the jury is without foundation because of the failure of the Trial Court to limit the jury's inquiries to the reciprocal duties existing between Royal and Strachan.[22]

THE TRIAL COURT FAILED TO INSTRUCT THE JURY AS TO ROYAL HAVING THE BURDEN OF PROOF TO OBTAIN AFFIRMATIVE ANSWERS TO THE INTERROGATORIES

There is not the remotest reference within the charge of interrogatories submitted to the jury as to which had the burden of proof, and thus the answers to the inter-

[22] This error was called to the Trial Court's attention. (R. 75)

rogatories cannot be relied upon. At no place within the charge did the Trial Court advise the jury that Royal had the burden of proof.[23] Therefore, for this separate and independent reason, Royal's reliance upon the interrogatories as answered by the jury is without merit.

THE INTERROGATORIES AS PHRASED BRING FORTH CONTRADICTIONS

The opinion by the Court of Appeals answers Royal's assertion that the jury's answers to the interrogatories can be logically interpreted so as to support a judgment granting indemnity. The interrogatories, even if answered in a consistent manner, could not form the basis for judgment in favor of Royal since they contain no finding that Strachan breached its warranty or that Royal's conduct did not preclude indemnity. Needless to say inconsistent answers made by a jury in confusion can afford no predicate for a possible recovery on the part of Royal.

ROYAL HAS NO STANDING TO MOVE FOR AN INSTRUCTED VERDICT OR A JUDGMENT NOTWITHSTANDING VERDICT

This Court[24] and various Circuit Courts of Appeals[25] have held that the ultimate issues in an action for in-

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[23] Strachan's suggested charge contained such an instruction (R. 98), and Strachan objected to the failure of the Trial Court to advise the jury as to the burden of proof being on Royal. (R. 76)

[24] **Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.**, 369 U.S. 355, 7 L.Ed.2d 798, 82 S.Ct. 780 (1962); and **Weyerhaeuser Steamship Co. v. Nacirema Operating Co., Inc.**, 355 U.S. 563, 2 L. Ed.2d 491, 78 S.Ct. 438 (1958).

[25] **Waterman Steamship Corp. v. David**, 353 F.2d 660, 665-666 (5th Cir., 1965), cert. den. 16 L.Ed.2d 683 (1966); **Moore-McCormack**

demnity are ones of fact calling for a determination by a jury. As the Court of Appeals stated in its opinion, there was a sharp dispute as to whether the accident resulted from a reported malfunction of one of the winches or the failure of a winch operator to respond to a signal. In any event, there was sufficient evidence to support a jury's conclusion on either of the two ultimate issues, namely, whether or not the stevedore breached its implied contractual duty to the vessel owner and if the vessel owner's conduct was such as to preclude indemnity. With this being the case, this Court cannot substitute its conclusions on issues of fact which are for jury determination as Royal asks it to do.

CONCLUSION

Royal's concluding remarks asking for judgment in order to obviate the necessity of another trial are shocking indeed, for Royal, and Royal alone, is responsible for the incomplete and erroneous charge of which it now complains. Royal's predicament is wholly of its own making for the District Judge relied upon Royal's repeated assertions that the charge and interrogatories as prepared by Royal were in all respects proper[26] and that Strachan's requested interrogatories and charge, together with the objections and

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Lines, Inc. v. Maryland Ship Ceiling Co., 311 F.2d 663 (4th Cir., 1962) (Interrogatories at page 666) (669—jury makes final general determination on indemnity); **McNamara v. Weichsel**, 293 F.2d 900, 904 (2d Cir., 1961) ("Here there were at least two important fact questions. Was there substandard performance of its stevedoring contract by Pittston? Was there conduct by Weichsel sufficient to bar recovery?")

[26] R. 51, 77, 84.

exceptions, were without merit.[27] How can Royal after leading the Trial Court into giving a charge and a set of interrogatories replete with errors, contradictions and confusion have the audacity to request this Court to enter judgment in its favor by calling for an end to litigation before a District Judge who it says by implication is prejudiced?

Because of Royal, at no time was the jury given the opportunity to pass upon the ultimate issues in this case, and the limited issues given to the jury were submitted in an improper manner. It cannot now be heard to complain of its own errors.

Strachan respectfully submits that Royal's Petition for Writ of Certiorari should be denied and that Strachan's Petition for Writ of Certiorari in No. 741 should be granted.

Respectfully submitted,

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[27] Strachan pointed out to the Trial Court in its exceptions to the charge and interrogatories that there was no inquiry as to whether or not the stevedore breached its warranty of workmanlike service (R. 72) or if the vessel owner's conduct was sufficient to preclude indemnity (R. 76), and when the Trial Court inquired of Royal if any objections were in order, the reply given was "None is good, sir." (R. 77)

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing brief of Appellee was served on the attorneys for the Appellant, Messrs. Burlingham, Underwood, Barron, Wright & White, William M. Kimball, of counsel, 26 Broadway, New York, New York 10004, and Messrs. Eastham, Watson, Dale & Forney, John P. Forney, Jr., of counsel, Esperson Building, Houston, Texas 77002, attorneys for the Appellant, Royal Netherlands Steamship Company, by mailing copies of said brief to said attorneys at the addresses shown above by first class mail, air mail to New York, postage prepaid, on this the 25th day of November, 1966.

E. D. Vickers

OF ROYSTON, RAYZOR & COOK